INTERIOR BOARD OF INDIAN APPEALS

Charles Stephens v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)

14 IBIA 154 (07/10/1986)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

CHARLES STEPHENS
v.
ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-36-A Decided July 10, 1986

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) concerning the granting of a right-of-way for road improvements across the Mary R. Rose Allotment No. 556, Caddo County, Oklahoma.

Appeal dismissed.

1. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It does not have the authority to award money damages against the Bureau of Indian Affairs.

APPEARANCES: Charles Stephens, pro se.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE HORTON

Charles Stephens, appellant, seeks review of a March 18, 1985, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) concerning the granting of a right-of-way for road improvements over the Mary R. Rose Allotment No. 556, Caddo County, Oklahoma. For the reasons discussed below, the Board dismisses this appeal.

Background

Appellant owns, in Indian trust status, an undivided 2/36 or 2/26 interest in allotment No. 556. 1/ The remaining interests in the allotment are owned by Leslie Standing, Linda Standing Johnson, Myra Clements Moore Brown Ross, Bruce Warren Moore, Patricia Brown, and Lawrence Standing. 2/

1/ The administrative record variously indicates both 2/26 and 2/36 as appellant's ownership interest. The Board is, therefore, unable to determine the exact extent of appellant's ownership interest.

2/ These other owners of the allotment are not parties to this appeal.

Allotment 556 is located in east central Caddo County, Oklahoma. The area is primarily leased as agricultural land. It is situated within the floodplain of Sugar Creek, approximately 1 mile above the creek's conjunction with the Washita River, and is subject to periodic flooding. When appellant inherited his interest in the allotment, it was bounded on the south by a ground-level Oklahoma section-line road, known as the East of Riverside Road, or old Route 805. Appellant states that previous flooding was able to drain across the allotment, apparently passing over old Route 805. Flooding made passage over the road difficult and hazardous, and required frequent road maintenance work. 3/

On or before December 21, 1979, a Bureau of Indian Affairs' (BIA) Form 5-5714, Road Construction Project Justification Checklist, was prepared concerning a proposal to improve Route 805. The form is signed by Vern L. Haddon, as "Tribal Official," on behalf of the Wichita Tribe. 4/ Among other information, space is provided on page 1 for narrative comments by the tribe concerning the proposed road work. The certifying tribal official stated the road work "would greatly improve road conditions to the homes of our Indian families and enhance the desirability of tribal lands;" "would make for a more easy access to Indian homes as the road conditions are in such a deplorable condition that during inclement weather, some of the roads are inaccessible due to wash-outs or erosion;" and the "roads specified now are used as school bus roads, and during extremely rainy seasons, these roads cannot be travelled on, or if attempted, damage to vehicles can result."

In March 1983 forms entitled "Owners Consent to Grant of Right-of-Way" were sent to each of the owners of allotment No. 556. The forms indicated that the application for right-of-way was made by Caddo County District No. 2. In the space for compensation for the granting of the right-of-way, the word "WAIVED" was typewritten on each document. The forms were signed by Patricia Donnis Brown, Leslie Standing, Linda C. Standing Johnson, Myra Clements Moore Brown, Bruce Warren Moore, and Lawrence Standing.

Appellant also received a consent form, but declined to sign. He states he believed changes to the road might cause flooding problems on his property. Therefore, he requested additional information concerning the proposed road improvement. By letter dated March 24, 1983, the BIA Area Transportation Engineer provided him with a plat of the property and told him if he had additional questions he could stop by the office or telephone. Another consent form was enclosed with the letter. On March 29, 1983, appellant visited the BIA office and reviewed the road work plans.

3/ Although not certain from the record, it appears that this maintenance work was the responsibility of the Caddo County Commissioner. See section E, page 3, of the June 1983 Environmental Assessment (EA): "If this alternative [do nothing to the road] is selected, the continued high cost maintenance and repairs and any improvements to the subject road section, would be the full responsibility of the County Commissioner for the district."

4/ The EA states in section A.2, page 1: "In Oklahoma, certain county section-line roads are selected for inclusion in the BIA Road System. The governing tribal bodies set priorities as to which roads will be on the system and in which order road improvements will be undertaken."

By letter dated April 20, 1983, the Superintendent of the Anadarko Agency, BIA (Superintendent), sent appellant another consent form and again requested he sign it. The Superintendent stated at page 1 of that letter:

> The findings of the Caddo County Board of Commissioners indicates that even after your inspection and review of the Area Transportation engineering data, you have refused to give written consent. The overall attitude of the Board of County Commissioners is that this road project is number one priority and is consistent with overall tribal objectives for the development and betterment of Indian roads. Furthermore, the human, social and economic consideration to the land in question by far exceeds any objections you may have to the new highway.

By letter dated May 25, 1983, the Superintendent informed appellant that the Board of County Commissioners was now offering him $50 for his share of the right-of-way. The Superintendent advised appellant: "Said offer has been appraised by agency personnel who have determined equitable just compensation for said easement to be $35.38. In view of the foregoing, Caddo County Commissioners' offer is considered just compensation." (Emphasis in original.) The Superintendent again included another consent form for appellant's signature.

On June 3, 1983, appellant wrote the Superintendent, stating he did not consent to the right-of-way and did not waive compensation for any damage the road design would cause.

By memorandum dated June 17, 1983, the Anadarko Area Director, BIA (Area Director), wrote the Superintendent stating:

> Your approval of the R/W [right-of-way] Grant is considered critical to the Highway Project, particularly the bridge on Sugar Creek.
>
> All R/W must be acquired on the East of Riverside project before the final plans can be approved for construction by the Federal Highway Administration.
>
> It is my understanding that Mr. Charles Stevens [sic throughout] owner of an undivided 2/36, has refused to sign and is concerned that the new road will cause damage to his property.
>
> On March 29, 1983, Mr. Stevens visited the Area Department of Transportation Engineering Section and discussed the road design in detail. However, we were not successful in convincing Mr. Stevens that our road design would not cause an increase in flood damage.
>
> * * * * * *
>
> The road grade was raised in this area, as it was generally throughout the project, because it is good engineering practice to do so. Elevating roadways above the surrounding ground helps

assure that the subgrade will stay dry and retain its strength. Hence the term "highway."

Replacing the Sugar Creek Bridge with a new one having a much larger waterway can only help prevent damage to adjacent property.

Please give your earliest attention to the resolution of this problem so that [Federal Highway Administration] approval can be obtained and a contract awarded in time to avoid losing Highway Trust Funds.

In late June 1983 the Anadarko Area Branch of Engineering Services (Roads) completed an environmental assessment (EA) of the proposed project. Among other things, the EA indicates the existing road would be upgraded; the new road would be at ground level; drainage would be provided; an additional 14 acres of privately owned land would be taken into the right-of-way; the new road would improve flood conditions, therefore justifying the expenditure of Federal funds in a floodplain; a new 165-foot reinforced concrete bridge, capable of withstanding a 50-year flood, 5/ would be constructed over Sugar Creek; safe, efficient vehicular transportation would be provided; and no major detrimental environmental effects were identified. The EA notes on page 2, section A.4: "The project completion target date is July 1984," and on page 3, section C.3: "This proposal is not controversial and no organized opposition has been evidenced and none is expected."

By letter dated June 28, 1983, the Superintendent informed appellant:

Your rationale for objecting to the project because of possible future damage to your recently inherited land is appreciated, and be advised that it is our inherent responsibility to protect your interest in this matter.

In considering the facts surrounding this particular project, it is our understanding that the present bridge is inadequate to handle the present flow of Sugar Creek based on a 50 year flood. We have received assurance that the elevating of the highway will not enhance flooding on your property due to the fact that the new Sugar Creek bridge waterway will be designed to pass the 50 year flood. We are aware that Sugar Creek, historically, has caused extensive flooding throughout the valley from Binger, Oklahoma, to the point it empties into the Washita River. Consequently, over a period of 20 years or more, the U.S. Department of Agriculture has constructed numerous upstream flood water retarding structures and channel improvements which [have] alleviated the flood problem considerably. Some lands will continue to have problems with flood waters and drainage, but it is not our intent or purpose to create new problems, nor is it our intent to approve projects detrimental to the interest of our Indian landowners.

5/ A 50-year flood is, essentially, a flood of such magnitude that it would expected to occur only once in every 50 years.

> After weighing the facts and assurances received from our departmental engineers, it is my decision to approve this project on June 29, 1983, on the Mary Rose allotment without your consent in accordance with provisions of 25 CFR Indians, Sec. 169.3(c)(2). [6/]

(Letter at 1.)

Appellant appealed this decision to the Area Director. By letter dated October 31, 1983, the Area Director acknowledged receipt of the appeal and advised appellant he had 30 days to file any further statements in support of the appeal. The closing paragraph of the Area Director's letter stated: "As you are aware, some preliminary work has begun by the county on this project, and Burns Paving of Oklahoma City, who was awarded the Bureau contract, will be proceeding with construction of Project # 805, pursuant to the terms of the contract."

On December 1, 1983, before a decision had been issued in his appeal, appellant forwarded to the Area Director statements purportedly signed by Patricia Brown (Brown) and Myra C. Moore Ross (Ross) withdrawing their consents to the right-of-way. Appellant's letter indicated that, with the revocation of Leslie Standing's consent, which was allegedly made several months earlier, 7/ more than 50 percent of the owners of the allotment did not now consent to the right-of-way. Appellant also noted the Area Director had allowed a contract to be let on the project while his appeal was pending and alleged non-Indian landowners along the right-of-way had been paid for their consent to the right-of-way. The Area Director issued a decision on April 19, 1984. In affirming the Superintendent's decision, he stated:

> This is in response to your appeal to the Anadarko Agency Superintendent's approval of a right-of-way on June 29, 1983, affecting the Mary R. Rose allotment in the SW 1/4, Section 5, T. 17 N., R. 9 W., for the purpose of improving BIA Road Route 805.
>
> As early as 1979, this road project (approximately 4 miles in length) was designated as a priority item by the Tribe, and as being consistent with their reservation area objectives. The existing road has long been in a deplorable condition, often times being impassable, subject to severe erosion and washouts, and difficult to maintain.
>
> Some of the benefit factors considered in planning the improved roadway were that the road serves as school and mail

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6/ This regulation provides in pertinent part:

"(c) The Secretary * * * may grant rights-of-way over and across individually owned lands without the consent of the individual Indian owners when * * * (2) the land is owned by more than one person, and the owners or owner of a majority of the interest therein consent to the grant * * *."

7/ Appellant alleges Leslie Standing wrote the Area Director withdrawing his consent but that the letter was lost by BIA.

routes, provides access to at least 5 Indian homes, and traverses 50% Indian-owned lands. The planning for construction and improvement has been extensive, with the prime objective being the completion of an adequate road facility serving Indian lands. The new right-of-way over the Rose tract will use approximately .064 acres. [8/] This tract is situated within the Sugar Creek and Washita River Floodplain and the improved road had been designed in such a way as to improve drainage, and rather than contribute to additional flooding, it will improve the situation.

Regulations for administering Bureau roads may be found at 25 CFR 170 and the procedure for acquiring rights-of-way as referenced therein are governed by Part 169. The Superintendent, having been presented with consents by all of the other owners of undivided interests in the SW 1/4, granted a right-of-way pursuant to 169.3(c)(2), as was set out in his letter to you on May 25, 1983. All owners in consenting, waived compensation although $50.00 was paid into the Agency for your account. We understand same has not been withdrawn nor accepted by you. [9/] The Superintendent advised that amount was in excess of the value provided by the Agency Appraiser, which was $35.38.

Upon examination of the records, plats, and inspection of the roadway, we concur with the Superintendent's disposition in this matter, not only for the above and foregoing, but for the reason that when completed this year, the roadway will enhance the property values along its route.

* * * * * *

The written statements made by co-owners, Patricia D. Brown and Myra C. Moore Ross will not be addressed nor considered as a part of your appeal. They may wish to discuss the matter with the Anadarko Agency Superintendent.

Appellant then appealed to appellee. In his decision, dated March 18, 1985, appellee states that although appellant's appeal is merely a resubmission of the appeal to the Area Director, he understands the appeal to center on the environmental impacts of the project and the consents of the other owners. As to these issues, appellee stated:

Regarding the environmental concerns, it appears to us that every effort was made by the Area Office's roads staff to accommodate your concerns. As noted earlier, that staff personally met

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8/ This should probably read 0.64 acre(s). The record shows BIA accepted appellant's calculation that the amount of land affected in the Mary Rose allotment portion of the right-of-way was 27,852.83 square feet.

9/ Appellant denies ever receiving this payment, and states if it had been offered to him he would have refused it because he did not consider it just compensation.

> with you at the Area Office as well as discussed the project with you by telephone. You had the opportunity to review the engineering documents and have your objections considered. Our review of the record has led us to the conclusion that the analysis set forth in the June 1983 Environmental Assessment of the project sufficiently answers your environmental concerns.
>
> Regarding the matter of consents, we note that the owners of almost 95 percent of the land involved gave their consents to the project and that, when unanimous consent cannot be secured, the superintendent may (as provided for in 25 CFR 169.3(c)(2)) approve the right-of-way. That authority allows the Secretary or his designated official (in this case, the Superintendent) to grant rights-of-way over and across individually owned lands without the consent of the individual landowners when ". . . the land is owned by more than one person and the owners or owner of a majority interest therein consent to the grant . . . ." Clearly, the aggregate benefits of the project outweighed the associated costs (both to individuals and to the community served by the project), and we believe the Superintendent acted properly in this matter. Regarding the two aforementioned retractions of consent filed by Ross and Brown, we would note that both parties gave their consent to the granting of the easement without compensation, as did the other owners of the Mary Rose tract, yourself excepted.
>
> The inclusion of the "statements" apparently made by co-owners Ross and Brown with the appeal indicate you were representing them. You were also informed that their complaints should be addressed to the Superintendent. Apparently, neither contacted the Area Office, and we are unaware of further pursuit by either complainant. We believe that the Brown and Ross statements, are more in the nature of a "complaint," as they were received approximately eight months after consent was given, and almost six months after the right-of-way was approved.

(March 18, 1985, decision at 3-4). Appellee affirmed the Area Director's decision in its entirety. An appeal to this Board was filed on June 3, 1985.

Discussion and Conclusions

[1] Notwithstanding the many allegations made by appellant regarding BIA's action in this case, appellant's only requested remedy is that he be awarded damages for the alleged harm caused to his trust property by BIA's right-of-way approval. The road he opposed has long since been built.

The Board has previously noted that it is not a court of general jurisdiction and that it has only the power delegated to it by the Secretary of the Interior. See 43 CFR 4.1, 4.330. The Board has no authority to award money damages against BIA. Lord v. Commissioner of Indian Affairs, 11 IBIA 51 (1982). Inasmuch as it seeks remedies beyond the authority of the Board to provide, the Board has no alternative but to dismiss the appeal. An

appeal is properly dismissed as moot when the reviewing tribunal can not provide relief. See Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365 (1986).

Without ruling on the merits of appellant's contentions that BIA acted improperly in granting the subject right-of-way, the Board observes that at the time of the grant BIA had obtained the written consents of the Indian landowners of record, except appellant, whose consent was sought on several occasions. In the belief that approval of the right-of-way was in the best interest of the Indians, BIA, as permitted by regulation, granted the right-of-way for road improvements notwithstanding a failure of all Indian owners to agree thereto. To refer this case for an evidentiary hearing, as the dissent proposes, so that the propriety of BIA's action can be fully examined and, as appropriate, a plan for relief fashioned, is not justified. Nor has appellant asked for this procedure.

This appeal is not one which the BIA or the Solicitor's Office chose to address. The dissent's broad conclusion that "appellant's arguments are legally substantiated" is only possible if we ascribe to BIA's failure to file a brief the legal equivalent of an admission. This is not a rule of practice in Board proceedings. Specific responses to the dissenting opinion are set out below.

The dissent's apparent assumption that an Area Director violates the Constitution by hearing an administrative appeal from a BIA Superintendent merely because he may have supported the decision the Superintendent reached, is not a proposition supported with authority on point. While it may have been appropriate for the Area Director upon receipt of Stephen's appeal to summarily affirm the Superintendent because of his prior involvement with the matter or to immediately forward the appeal to the next higher reviewing official, neither action was required by law. 10/ Had he been presented with credible reasons that the Superintendent's action was improper, the Area Director presumably was capable of changing his mind, even if he had been predisposed to affirm the decision beforehand. When this Board receives requests for reconsideration of its decisions, we certainly do not dismiss them on the ground that we have already spoken. Knowing that we are prone to error like anyone else, we expressly provide for reconsideration petitions. 43 CFR 4.315.

BIA Area Directors and Superintendents are in frequent contact with each other concerning particular Indian affairs. From the Board's experience, Superintendents' decisions are upheld by Area Directors in the vast majority of appeals. This Board exists so that parties to whom we may be in a position to grant relief may have at least one opportunity for Departmental review of BIA decisions by other than BIA personnel.

The dissent states BIA erred "by letting the contract and allowing work to be undertaken while an administrative appeal was pending." After

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10/ In fact, governing regulations direct that the "Area Director shall render a written decision in each case appealed to him." 25 CFR 2.18.

noting the provisions of 25 CFR 2.3(b), 25 CFR 2.18, and 43 CFR 4.21(a), the dissent concludes: "In this case, because timely appeals from the decision to grant the right-of-way were filed at each level, BIA did not have authority to put the decision into effect." The dissent cites Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982), for the proposition that the Board has held that as long as timely appeals are filed with BIA and the Board, BIA is without authority to place any of its decisions into effect. This is not what the Board held. After noting the provisions of 43 CFR 4.21(a) and 25 CFR 2.3(b), the Allen decision concluded: "These two sections give the authority to declare a decision immediately effective to the Departmental officer to whom the appeal is made, the Board, or the Director of the Office of Hearings and Appeals." (Emphasis added.) 10 IBIA at 146, 171, 89 I.D. 508, 521.

The automatic suspension provisions of 43 CFR 4.21(a) have no application to this case. They are a part of the general rules "applicable to * * * proceedings before the Hearings Division and the several Appeals Boards of the Office of Hearings and Appeals." 43 CFR 4.20. The purpose of 43 CFR 4.21(a) is to suspend the effectiveness of an agency decision during the time in which a person may appeal to an Appeals Board; the timely filing of an appeal to an Appeals Board continues the suspension. This general rule applies "except as otherwise provided by law or other pertinent regulation." Here, the BIA decision to approve the right-of-way was made by a superintendent of BIA, whose decision was appealable to an area director. The area director's decision was then appealable to the "Commissioner of Indian Affairs" pursuant to 25 CFR 2.18. (The successor position to the Commissioner is the Deputy Assistant Secretary--Indian Affairs.) Although 43 CFR 4.21(a) could not operate to stay the effectiveness of any decision by the agency superintendent or BIA area director, BIA's own regulations also suspend the effectiveness of BIA decisionmaking during the time in which appeals may be pursued through the Bureau. The operative regulation is 25 CFR 2.3(b) which states:

> (b) If no appeal is timely filed, the decision shall be final for the Department. The officer to whom the appeal is directed may require an adequate bond to protect the interest of any Indian, Indian tribe, or other party involved during the pendency of the appeal. In order to insure the exhaustion of administrative remedies before resort to court action, no decision which at the time of its rendition is subject to appeal to a superior authority in the Department shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the officer to whom the appeal is made shall rule that the decision appealed from shall be made immediately effective. [Emphasis added.]

The above regulation, which has been described by the courts as the equivalent of an automatic stay rule, Coomes v. Adkinson, 414 F. Supp. 975, 987 (D.S.D. 1976), contains the clearly stated exception that the Bureau official to whom an appeal is made may rule that the decision appealed from shall be immediately effective. Thus, not only was BIA expressly authorized to place its right-of-way grant into effect notwithstanding the filing of an appeal, it did so in this case with clear notice to appellant. In acknowledging receipt of Stephens' appeal, the Area Director informed appellant that

a construction contract had been let and that the contractor "will be proceeding with construction of Project # 805, pursuant to the terms of the contract" (Letter from Area Director to Stephens dated Oct. 31, 1983). 11/ Appellant was therefore put on formal notice that rather than exhausting other administrative remedies in the Department, he could proceed to court for injunctive or other relief.

It is proper and necessary that the Department's regulations reserve to BIA the authority to place any of its decisions into immediate effect as appropriate. While it is not clear whether the right-of-way grant in this case was of immediate urgency, 12/ there are undoubtedly numerous BIA decisions that could be so labelled. E.g., herbicide spraying on grazing or forest lands; cattle detention for disease control; trespasser removal; preservation of antiquities; etc. See 25 CFR 163.24, 166.24-166.25; 261.6. The dissent's notion that as long as any appellant makes a timely appeal of a BIA decision to the Bureau or the Board, the matter must be left in abeyance unless only the Board or the Director, Office of Hearings and Appeals, rules otherwise, is neither the law nor good policy. 13/

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11/ The dissent states that review by the Area Director in this case "appears to have constituted nothing more than a delay tactic in order to ensure that the road appellant opposed would be essentially completed before a decision was issued." This criticism of the Area Director is completely unsupported and fails to recognize that he expressly advised appellant on receipt of the appeal that the contested road improvements were going forward irrespective of the appeal.

12/ This is not to suggest that an "urgent need" standard governs when BIA may accord immediate effect to one of its decisions, though this might be an appropriate policy for the Bureau to consider. As presently written, no standard pertains except the requirement that the official to whom an appeal is made must rule that the decision appealed from is being made effective. 25 CFR 2.3. The absence of a governing standard is not unique to BIA. For example, any right-of-way grant across public lands approved by the Bureau of Land Management (BLM), regardless of significance is not automatically stayed by the filing of an administrative appeal. See 43 CFR 2804.1(b); 2884.1(b).

BIA's decision to accord immediate effect to the road project before us appears to have been made "to avoid losing Highway Trust Funds." June 17, 1983, memorandum from Area Director to Agency Superintendent.

13/ Where a party feels the agency has acted improperly in placing a decision into immediate effect, it may, as well as proceeding to court, also seek a stay from Departmental reviewing officials. This is a frequent practice by appellants appearing before the Interior Board of Land Appeals (IBLA) seeking review of decisions by BLM. In addition to rights-of-way grants, BLM has specified numerous other decisions that are deemed effective upon issuance, including: oil and gas operations (43 CFR 3165.4); mining plan of operations (43 CFR 3809.4(f)); timber management (43 CFR 5003.1); simultaneous oil and gas leasing (43 CFR 3112.3(g)); special recreation use permits (43 CFR 8372.6); and coal lease readjustment (43 CFR 3451.2(e)). Prior to seeking a stay from IBLA, parties adversely affected by one of the above decisions are not

The dissent claims BIA should have held a public hearing concerning this project because it was "controversial." With all Indian owners except appellant having consented to the project and with apparent tribal support for the road improvement proposal, BIA can hardly be faulted for declining to hold a public hearing on the above basis.

The dissent states BIA erred in failing "to consider the attempted withdrawal of consent by several Indian landowners." Here, the purported withdrawals sent by appellant to BIA were received 8 months after consent was given, almost 6 months after the right-of-way was approved, and after commencement of work on the project. In effect, BIA held the purported withdrawals of consent to be untimely, and there is nothing of record to suggest they were not.

In further reference to the Board's decision in Allen, supra, the dissent states this is an appropriate case in which to order a fact-finding hearing, and, as appropriate, "to require BIA to present and implement a plan for alleviating [any] damage." Allen and the string of jointly considered cases cited in footnote 11 of the dissent, have nothing in common with this case. In 20 separate appeals, appellants in the foregoing cases challenged a BIA decision terminating financial assistance they were receiving for custodial care services. Numerous legal and factual questions were presented that were thoroughly briefed by appellants and the Government. The Board issued several important rulings after extensive briefing. In all 20 cases, the 3 major issues were described by the Board as: (1) whether appellant was properly receiving assistance before his termination; (2) whether the assistance appellant was receiving was properly terminated; and (3) whether BIA was required to continue assistance to appellant pending a determination of the case by the Board. In its Summary of Conclusions, the Board stated in these cases:

> [a]ppellant was improperly determined ineligible to receive custodial care on the basis of 66 BIAM 5.10A, an unpublished rule; that BIA incorrectly interpreted other provisions of 66 BIAM Part 5; and that appellant's custodial care assistance was improperly terminated prior to completion of his evaluation* * * . The Board realizes that there may be several ways to remedy the

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fn. 13 (continued)
precluded from seeking a stay from the agency itself. See, e.g., 43 CFR 5003.3(f) (timber sale protests). Stay requests are adjudicated by BLM and IBLA pursuant to recognized inherent authority; neither the right to request a stay nor procedures governing the handling of such requests are prescribed by regulation. Cf., 30 CFR 243.2 (authority of Director, Minerals Management Service, or Deputy Assistant Secretary--Indian Affairs, to suspend effectiveness of royalty management decisions.)

To the extent the appeal in this case centers around appellant's contention that the Area Director should not have allowed the contested road construction to proceed until his appeal was adjudicated, appellant could have sought reversal of the effectiveness decision in the Department or the courts but did not.

> errors noted. Accordingly, BIA is ordered to develop a plan effectuating the Board's holdings in this case. This plan will be filed with the Board within 30 days from the date of this decision.

See, e.g., Allen, supra at 172.

It is obvious that the Allen cases did present justiciable controversies that the Board could act on. These cases did not involve claims for damages from a construction project, but the restoration of financial assistance to Indians with special needs. Substantive legal error was found by the Board from the record on appeal, and it was clear from the briefs of the parties that several ways of remedying the error could be considered. Thus the request for a plan.

To submit that the precise procedure in Allen is appropriate in this case where reversible error by BIA has not been demonstrated, and where the relief sought cannot be granted administratively, is absurd. Even if it were proper for the Board to entertain this appeal, the "precise procedure" in Allen did not entail referring the matter for an evidentiary hearing. Many of the questions raised by the dissent could possibly be answered by asking BIA to supplement the record or through remand. However, because the action complained of "had been carried out by the time the appeal was briefed before the Board remand of the case to consider appellant's objections and to allow consideration of other alternatives would be an exercise in futility." Utah Wilderness Association, 91 IBLA 124 (1986) (appeal from BLM decision granting application for permit to drill where the drilling already occurred.)

The dissent observes "it is the responsibility of this Board to secure justice for those who appear before it" and that "the majority has chosen to ignore what appears to be a clear violation of the Federal trust responsibility * * *." Several responses to this are appropriate. Appellant's request for damages in this case is based on allegations that (1) BIA erred in approving the right-of-way and allowing construction to proceed; and (2) that flood damage foreseen by appellant has occurred. For reasons already discussed, were we to reach the merits of this appeal the majority could not conclude from the record before us that BIA's approval of the right-of-way and allowance of construction was error. 14/ Further, BIA did not guarantee that the

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14/ Of all the arguments raised by appellant, the most substantive is the apparent discrepancy between the EA's report that the proposed roadway would be ground level and the ultimate decision that led to an elevated road. One of the peculiarities of this case is that, notwithstanding the single-phrase reference in the EA that the roadway would be ground level, the BIA decisionmakers and appellant seemed to recognize all along that the road would be elevated. Whether the EA's findings and conclusions were in fact based on a different premise, whether a supplemental EA was sought, whether only part of the 4-mile project was planned and constructed as an elevated roadway, are questions the record before us does not resolve.

planned roadway improvements across the floodplain would prevent future flooding or flood damage. The Superintendent's decision observed that "some lands will continue to have problems with flood waters and drainage * * *." Appellant or any other Indians who may believe BIA should be doing more to protect their lands are not precluded from seeking such action from BIA. In this regard, the Board notes that six allottees, including appellant, wrote the Anadarko Superintendent on March 21, 1985, requesting "that action be taken as soon as possible to correct a drainage problem" on the Mary Rose allotment. The record does not show what, if any, response the Superintendent made to this request. If adversely affected by the Superintendent's action, 25 CFR Part 2 provides a right of appeal to the Area Director and ultimately to this Board.

BIA's decision in this case was an attempt to benefit many Indians and the tribe concerned by improving a road that serves Indian people. The Mary Rose allotment and appellant's fractional share thereof was just one portion of land traversed by the 4-mile project. It is not beyond peradventure that had BIA elected not to proceed with the right-of-way grant for road improvements, there would be those charging the Bureau with failure to fulfill its trust obligations.

Finally, while the majority recognizes that the Secretary should be aware of his trust responsibility when acting as a quasi-judicial officer, "whatever trust responsibility he may have [does] not extend so far as to require him to abandon his role as a neutral, impartial and disinterested decisionmaker." Koniag, Inc. v. Kleppe, 405 F. Supp. 1360, 1373 (D.D.C. 1975).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary--of the Interior, 43 CFR 4.1, the appeal from the March 18, 1985, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations), is dismissed.

//original signed
Wm. Philip Horton
Acting Chief Administrative Judge

I concur:

//original signed
Franklin D. Arness
Alternate Member

I concur in the result:

//original signed
Bernard V. Parrette
Alternate Member

ADMINISTRATIVE JUDGE MUSKRAT DISSENTING:

Appellant's arguments on appeal are far-reaching. He challenges every aspect of the transaction culminating in the change of Route 805. In my considered judgment, the appellant's arguments are legally substantiated and should be addressed on the merits by this Board.

Initially appellant questions whether this project was in fact ever considered by the tribe, as is represented by BIA. He alleges the tribe has no comprehensive plan for reservation or road development, notes the 1979 road construction justification checklist is the only suggestion of tribal consideration of the project, observes the checklist does not show any priority number assigned by the tribe, and questions the authority of the "tribal official" whose signature appears on the checklist to act for the tribe. He also alleges tribal matters are decided by resolution and no tribal resolution accompanies the checklist. Finally, he notes the narrative explanation of community involvement presented on the checklist is totally nonresponsive to the question and shows no community involvement at all.

Regulations governing BIA roads are set forth in 25 CFR Part 170. Section 170.4a provides in pertinent part:

> The Commissioner [of Indian Affairs], who is responsible for the planning, surveys and design, shall keep the appropriate local tribal officials informed of all technical alternatives of proposed road developments. The Commissioner shall recommend to the tribe those proposed road projects having the greatest need as determined by the comprehensive transportation analysis. Tribes shall then establish annual priorities for road construction projects.

In order for BIA to show compliance with these regulatory requirements, the information necessary to demonstrate that a road project has been undertaken in accordance with the proper tribal involvement and determination of the priority for such projects should be part of the administrative record of each BIA road construction project. Under ordinary circumstances, the failure to include such information in the administrative record would necessitate an evidentiary hearing to show compliance with the regulatory requirement.

The administrative record in this case contains no evidence other than the signature on the checklist and the unsupported statements of BIA officials to show the tribe determined this project was high priority. 1/ In my judgment, BIA erred in not providing information in the administrative record to allow a determination of this issue.

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1/ Perhaps the most revealing evidence contained in the record as to priority status of the project is the Superintendent's statement to appellant in his Apr. 20, 1983, letter that the Board of County Commissioners viewed the project as a number one priority.

A second argument raised by appellant is that BIA failed to hold a public hearing on this project as is required at 25 CFR 170.10-.12. These regulations state:

> § 170.10 Purpose and objectives.
>
> The regulations in this subpart govern the calling and conducting of public hearings on Bureau of Indian Affairs road projects beginning with road projects scheduled to begin construction in Fiscal Year 1975, and thereafter. In order to promote coordination and comprehensive planning of construction activities on Indian reservations, the objectives for conducting public hearings on proposed road projects are to:
>
> (a) Inform interested persons of the road proposals which affect them and allow such persons to express their views at those stages of a project's development when the flexibility to respond to these views still exists.
>
> (b) Insure that road locations and designs are consistent with the reservations' objectives and with applicable Federal regulations.
>
> § 170.11 Criteria.
>
> A public hearing shall be held for each project that:
>
> (a) Is a new route being constructed,
>
> (b) Would significantly change the layout or function of connecting or related roads or streets,
>
> (c) Would have an adverse effect upon adjacent real property, or
>
> (d) Is expected to be of a controversial nature.
>
> § 170.12 Need for public hearing determined.
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> The Superintendent will call a meeting of representatives from the tribe, the Bureau of Indian Affairs, and other appropriate agencies to determine for each road project if a public hearing is needed. The determination will be based on the criteria given in § 170.11. More than one public hearing may be held for a project if necessary.

Appellant alleges that under section 170.12 a meeting should have been called to determine whether a public hearing was required, and a hearing was required because the project met conditions (a), (c), and (d) of section 170.11. He further contends that section 170.10(a) required this hearing to be held early in the project's planning stage, while flexibility still existed to respond to the views presented.

Again, the record contains no evidence that BIA properly met with tribal and other agency representatives 2/ to determine if a public hearing was needed, as is mandated by sections 170.10-.12. As with section 170.4a, such information should be part of this and all other road construction project records. I believe BIA erred procedurally in not including this information in the record.

Furthermore, in my opinion BIA erred substantively in failing to hold a public hearing. As early as March 1983, appellant contended the project would adversely impact the adjacent property. The potential adverse impacts of the project are addressed only in BIA's June 1983 EA. 3/ The only adverse effect found was the commitment of additional land to the right-of-way. The flooding concerns raised by appellant were mentioned only tangentially in the assertion that flooding conditions would be improved. There was no discussion of how this improvement would be accomplished. BIA was on notice that one of the landowners believed the project would cause harm to the Indian trust land adjacent to the right-of-way. When BIA failed to resolve appellant's concerns, and then failed to hold a public hearing, it violated the objective set forth in 25 CFR 170.10(a) to inform the other owners of proposals that would affect them. The fact that BIA did not agree with appellant's concerns does not eliminate the requirement that he be given an opportunity to present his views in an open and public forum at a time when flexibility in decisionmaking still existed. 4/

Appellant also states a public hearing was required because the project was controversial. Again, this contention is addressed only in the EA, which states in section C.3 at page 3: "This proposal is not controversial and no organized opposition has been evidenced and none is anticipated." This statement is incorrect. In order for a matter to be controversial, either according to its dictionary meaning or BIA's regulations, it is not necessary for more than one person to be in opposition. The matter was controversial because of appellant's strong and continuous opposition. The fact there had been "no organized opposition" is not determinative. 5/

2/ Appellant notes the June 1983 environmental assessment (EA) shows no consultation with state officials, such as the Oklahoma Water Resources Board, concerning the design and potential environmental impacts of the project. Full consultation with all agencies, both Federal and state, having information relevant to a proposal should be shown in the record. The Federal trust responsibility requires nothing less.

3/ The EA is discussed in depth infra.

4/ Public hearings are not intended merely to be opportunities to allow discontented people to voice their opposition. Hearings are an integral part of the decisionmaking process, and concerns brought up at hearings are to be addressed by the decisionmaker.

5/ Appellant alleges the reason there was no organized opposition was because other landowners were not informed of the potential problems or of their right to compensation.

If the statement contained in the EA had been made when the EA should have been prepared, i.e., before the decision was made to proceed with the project, it probably would have been a correct statement of BIA's expectations. Once appellant's opposition was voiced, however, the project became controversial.

I believe BIA erred in not including in the administrative record sufficient evidence to allow a determination of whether the requirements of 25 CFR 170.12 were met. Furthermore, in my opinion BIA violated 25 CFR 170.11 when it failed to hold a public hearing when it learned the project was controversial due to appellant's assertions that it would have an adverse effect on adjacent property.

Appellant next contends BIA violated 25 CFR 169.12 and 169.13 by failing to advise him and other Indian landowners of their right to compensation for the right-of-way and for other damages incident to the construction and maintenance of the road. Sections 169.12-.13 state:

> § 169.12 Consideration for right-of-way grants.
>
> Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this Part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiation for a right-of-way or renewal.
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> * * * * * *
>
> § 169.13 Other damages.
>
> In addition to the consideration for a grant of right-of-way provided for by the provisions of § 169.12, the applicant for a right-of-way will be required to pay all damages incident to the survey of the right-of-way or incident to the construction or maintenance of the facility for which the right-of-way is granted.

(Regulatory history citations omitted).

Appellant asserts first that BIA totally abdicated its responsibilities by inserting the word "waived" in the blank for compensation on the consent forms. He also states BIA's assistance in advising him that his interest was worth $35.38 was more of a directive, and BIA did not provide him with a copy of the appraisal report so he could check its accuracy. Finally, appellant alleges intimidation by BIA officials, rather than assistance, stating that while he was reviewing the plans he was told "we will pay the non-Indian owners, but if you try to be paid we'll make it cost you more than you'll ever get" (Opening Brief at F-5).

There is no question that appellant and all owners of land along the project were entitled to compensation for any expansion of the right-of-way 6/ and any damages caused by the construction and maintenance of

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6/ Expansion of the right-of-way could include both area and time extent, if a perpetual easement had not previously been granted.

the road. Aside from the regulatory requirement in 25 CFR 169.12-.13, the United States Constitution prohibits the taking of private property without just compensation: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. BIA and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution. Atchinson, Topeka & Santa Fe Railway Co. v. Deputy Albuquerque Area Director, 14 IBIA 46, 93 I.D. 79 (1986).

BIA's regulations in sections 169.12 and 169.13 state the trustee's affirmative responsibility to inform the trust beneficiary of damage that might be caused to the corpus of the trust by the granting of a right-of-way, to value that damage, and to assist the trust beneficiary in receiving just compensation. There is no evidence in the record that BIA fulfilled this regulatory responsibility, especially in light of the allegation that non-Indian landowners were compensated.

Appellant next contends BIA violated 25 CFR 170.4 by making construction expenditures before the project was approved by the Secretary of Transportation. He argues that because under section 170.2(g) "construction" includes "all expenses incidental to the construction and improvement of roads and bridges including * * * the acquisition of rights-of-way," expenditures for wages to secure, survey, and stake the right-of-way, and to draw plans and design the road, all made before the owners were asked to consent to the right-of-way, were illegal.

The administrative record in this case gives no indication of the date the Secretary of Transportation approved this project or the actions mentioned by appellant were taken. Although the record is thus insufficient for a factual determination in this matter, I believe BIA erred if it committed funds to the actual acquisition of the right-of-way, as distinct from the preliminary, basic expenses of determining whether the road should be improved. Because of the lack of factual evidence, it cannot be determined whether BIA actually committed error in this instance.

Similarly, appellant argues BIA violated 25 CFR 170.5(a) by failing to obtain the written consent of the landowners "before any work [was] undertaken for the construction of road projects." Again, the record is factually insufficient to decide this issue. If construction, as defined in 25 CFR 170.2(g), was undertaken before consent was given, I believe BIA would be in error.

Appellant also argues BIA violated 25 CFR 170.5a in contracting the road project to a non-Indian company when BIA had construction equipment in the area, and unemployed trained or trainable Indians were available to do the work. Section 170.5a states:

> The Bureau of Indian Affairs road program shall be administered in such a way as to provide training and employment of Indians. The Commissioner may contract with tribes and Indian-owned construction companies, or the Commissioner may purchase materials, obtain equipment and employ Indian labor in the construction and maintenance of roads.

The administrative record gives no indication of who did the work on this project, or the circumstances under which the contract was let. It thus cannot be determined whether or not BIA complied with the requirement of section 170.5a. Again, in my opinion this information should be part of the record of each road construction project.

Appellant next contends his rights to due process were violated when he was forced to appeal the Superintendent's decision to the Area Director, who had already influenced the Superintendent's decision. Appellant further alleges appellee's decision shows on its face that no independent examination of the appeal was conducted. Appellant thus considers the entire appeal process to have been a farce.

Appellant's rights to due process in administrative review are guaranteed by the Fifth Amendment to the United States Constitution: "No person shall * * * be deprived of life, liberty, or property, without due process of law." In this case, review by the Area Director, an official who had influenced the decisionmaking process for the initial decision, may have violated appellant's right to due process. Because of his substantive involvement, I believe the Area Director erred in not immediately disclosing his conflict of interest and forwarding the appeal without delay to the next official in the administrative review process. 7/

As to his environmental concerns, appellant states he is a contractor and, based on his experience and knowledge, has from the beginning questioned the design of the road. Appellant believed an elevated roadbed would act as a dam, causing water that had previously flowed over his property and the old road to be retained on the property for extended periods of time. Such retention would, he contended, cause damage to the property and reduce its value for cropland. He expressed these concerns to BIA at all stages of the proceeding, and specifically told them he would consider giving his consent to the right-of-way if the drainage problem was adequately addressed. See June 3, 1983, letter to Superintendent. On appeal appellant has included pictures allegedly showing that the damage he feared has in fact occurred. 8/

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7/ Cf. also, Sessions, Inc. v. Morton, 348 F. Supp. 694, 703 (C.D. Cal. 1972), aff'd, 491 F.2d 854 (9th Cir. 1974):

"'The delays of the Department of the Interior through its Bureau of Indian Affairs, * * * raise serious questions of concern for Indian affairs * * *. The Department is charged with the responsibility of the management of its trust obligations in the best interest of Indian beneficiaries. This fiduciary duty carries with it--if not express--at least an implied requirement of diligence."

In this case "review" by the Area Director appears to have constituted nothing more than a delay tactic in order to ensure that the road appellant opposed would be essentially completed before a decision was issued.

8/ Furthermore, appellant questions the accuracy of computations made concerning the project. In regard to the computation of additional land taken by the project, he notes: "The engineer and/or staff submits a map showing the amount of land to be taken for right-of-way with all the dimensions necessary to figure the square footage involved. They then calculate the square footage and came up with the wrong answer." (Opening Brief at D-2; emphasis

In his decision appellee states every effort was made to accommodate appellant's concerns. The examples of this accommodation cited are meetings, telephone conversations, and an opportunity to review the engineering documents. Appellee concludes the June 1983 EA sufficiently addressed appellant's environmental concerns.

The administrative record shows BIA staff discussed the project with appellant. It also shows that on each such occasion, appellant was given another consent form and urged to sign it, even though no changes had been made in the road's design. Furthermore, the Area Director's June 17, 1983, memorandum to the Superintendent strongly indicates the staff was concerned only with converting appellant to their way of thinking about the project. There is no evidence whatsoever that BIA ever seriously considered appellant's environmental concerns. Instead, the strong suggestion is BIA had decided what it would do and was not interested in appellant's reservations.

As for the sufficiency of the EA, one purpose of environmental review of projects undertaken with Federal funds is to provide an opportunity, while there is still time for flexibility in decisionmaking, to discover and correct to the extent possible adverse environmental impacts that might be associated with the proposed project. See, e.g., Save Lake Washington v. Frank, 641 F.2d 1330 (9th Cir. 1981); Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975).

Here, the EA can only be seen as an after-the-fact justification for a decision which had already been made. The owners of the property were sent consent forms in March; in mid-June the Area Director told the Superintendent to solve the problem raised by appellant's refusal to consent so Federal highway funds would not be lost; the EA was finally prepared in late June.

Furthermore, the EA does not discuss the potential environmental impacts of the road that was constructed. As appellant notes, the EA discusses a ground-level road. The road that was constructed is elevated approximately 8 feet above ground level. This elevation was clearly contemplated from the beginning of the project, as is evidenced by the engineering designs showed to appellant, and the statements of BIA officials appearing in the record. It is inconceivable that an EA which does not discuss the project contemplated or built, can possibly adequately address the environmental questions raised about the project.

Appellee also found the Superintendent properly exercised his authority under 25 CFR 169.3(c)(2) to approve the right-of-way over appellant's objection because landowners comprising the majority of the ownership interests had given their consent. Section 169.3(c)(2) states:

> The Secretary may issue permission to survey with respect to, and he may grant rights-of-way over and across individually

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fn. 8 (continued)
in original.) Appellant also questions whether the volume of a 50-year flood was properly calculated, and notes an apparent discrepancy between BIA's flood calculation of 14,658 cfs and the Oklahoma Water Resources Board's actual metering of Sugar Creek during flood stage at more than 32,000 cfs.

> owned lands without the consent of the individual Indian owners when * * * the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant.

Appellee is correct that this section normally gives the Superintendent authority to grant a right-of-way across individually owned Indian lands over the objection of some owners when individuals holding a majority of the ownership interests agree to the right-of-way. Such authority is necessary to prevent absolute stalemates in the use of Indian trust land.

However, in this case, there is evidence three of the owners attempted to withdraw their consent. Appellee's determination that section 169.3(c)(2) still applied, therefore, necessarily includes a finding that these owners could not or did not properly withdraw their consent.

On the advice of the Area Director, appellee described the attempt by Brown and Ross to withdraw consent as "complaints." "Complaint" is defined in 25 CFR 2.1(e) as "a written request for correction or reconsideration of an action or decision claimed to be legally or administratively incorrect but not violative of the complainants own legal rights or privileges." "Complaint" is thus distinguished from "appeal," which involves a "request for correction of an action or decision claimed to violate a person's legal rights or privileges." 25 CFR 2.1(d).

It is clear Brown and Ross did not file complaints. Their statements claim violation of their rights in that they allege BIA gave them misinformation and false information in order to obtain their consent and that they therefore sought to withdraw consent because of BIA's alleged misrepresentations.

There is no regulatory prohibition against withdrawal of consent before a final administrative decision has been issued. Thus, two questions arise from this situation. The first is whether Brown, Ross, and Leslie Standing actually intended to withdraw their consent. Standing's position is referred to by appellant, with the comment that the Area Office lost his letter; the statements by Ross and Brown clearly state they wish to withdraw consent. The information necessary to determine what percentages of the allotment are owned by each individual, whether each actually intended to withdraw consent, and whether such withdrawal of consent reduced the ownership interests consenting to the right-of-way to less than a majority are not part of the record. If, however, at whatever point in the proceeding prior to a final administrative decision, enough owners withdrew consent to reduce the ownership interests consenting to less than a majority, I believe BIA lost authority to approve the right-of-way under 25 CFR 169.3(c)(2). 9/

9/ Appellee states Brown and Ross did not pursue the matter further with the Superintendent as they were instructed to do by the Area Director. Considering the circumstances of this case, it is quite possible they believed further action would have been useless.

The second question is whether or not the contract was properly let while an appeal was pending. Under 25 CFR 2.3(b):

> In order to insure the exhaustion of administrative remedies before resort to court action, no decision which at the time of its rendition is subject to appeal to a superior authority in the Department shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. § 704, unless when an appeal is filed, the officer to whom the appeal is made shall rule that the decision appealed from shall be made immediately effective.

No determination appears in the administrative record making the Superintendent's decision effective immediately.

Section 2.18 further provides that the Area Director's decision will be effective 60 days from receipt unless an appeal is timely filed. The timely filing of an appeal stays the effective date of the decision as provided in 43 CFR 4.21(a):

> Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. However, when the public interest requires, the Director [of the Office of Hearings and Appeals] or an Appeals Board may provide that a decision or any part of it shall be in full force and effect immediately.

No such determination was made by the Director or the Board.

The Board discussed these regulations in Allen v. Navajo Area Director, 10 IBIA 146, 170-71, 89 I.D. 508, 520-21 (1982). The Board there held the regulations require the effective date of a decision to be stayed if a timely administrative appeal is filed. In this case, because timely appeals from the decision to grant the right-of-way were filed at each level, BIA did not have authority to put the decision into effect. Since BIA could not put the decision into effect, it did not have authority to let the contract or allow work to be undertaken. By granting the right-of-way, letting the contract, and performing the work while an appeal was pending, BIA violated appellant's rights. 10/

10/ As the Board noted in Allen, 10 IBIA at 171 n.27, 89 I.D. at 521 n.27:

"The procedural regulation of the BIA that defers the effectiveness of appealable decisions until completion of the appeal period, unless otherwise directed by an appropriate officer, was viewed with favor in Coomes v. Adkinson, 414 F. Supp. 975 (D.S.D. 1976). The court stated that the provisions of 25 CFR 2.3 serve, among other things, to 'protect the interests of

In summary, I believe BIA erred (1) in not providing sufficient information in the record to show that: the project was undertaken after proper tribal involvement and in accordance with a tribal determination of priority, a public hearing was discussed with the appropriate officials and found not to be necessary, funds were not expended for the acquisition of the right-of-way before the owners consented and/or the Secretary of Transportation approved the project, and Indian preference was properly followed; (2) in failing to: hold a public hearing on a road construction project that was controversial because, among other things, of its alleged potential adverse impacts on adjacent real property, assist Indian landowners in valuing potential damage to their property and receiving just compensation for that damage, consider the attempted withdrawal of consent by several Indian landowners, consider the environmental concerns raised about the project, and prepare the EA before a final decision on the project was made; (3) by letting the contract and allowing work to be undertaken while an administrative appeal was pending; and (4) by violating appellant's rights to due process.

The problem arising from this case is that of determining an appropriate remedy for these violations of appellant's rights. Despite the fact BIA acted illegally in building the road, it nevertheless exists and thus constitutes a fait accompli which no order of this Board can undo. Nevertheless, appellant does have a right to whatever administrative remedies are available to alleviate the damages he has suffered as a consequence of this wrong.

In my judgment, it is the responsibility of this Board to secure justice for those who appear before it. To conclude, as does the majority, that the Board can offer no remedy because it cannot grant the specific remedy requested by an Indian pro se appellant is to put form over substance. The majority has chosen to ignore what appears to be a clear violation of the Federal trust responsibility resulting in damage to Indian trust property. To ignore such a wrong on a mere technicality does not comport with the Board's responsibility to provide independent, objective administrative review of actions taken by the BIA and to provide an appropriate administrative remedy for any wrong legally established. Cf. Redfield v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 190 (1984) (Muskrat, J., dissenting).

In the present appeal, I believe the Board should reach the merits of the appellant's appeal and at a minimum reproach the Bureau for its errors. Furthermore, following a determination on the merits, I would refer this case to the Hearings Division of this Office for an evidentiary hearing and recommended decision by an Administrative Law Judge. The hearing would be a fact-finding endeavor to determine if damage is in fact being caused to Indian

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fn. 10 (continued)
parties * * *, allow the agency to develop a record, exercise its discretion, apply its expertise, and, possibly, discover and correct its own errors.' Id. at 987."

trust property by the altered road and, if so, to require BIA to present and implement a plan for alleviating that damage. 11/

//original signed
Jerry Muskrat
Administrative Judge

11/ Previous decisions where the Board on its own initiative applied this procedure include: Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982); Barton v. Navajo Area Director, 10 IBIA 173 (1982); Henry W. Begay v. Navajo Area Director, 10 IBIA 189 (1982); Johnny Begay v. Acting Navajo Area Director, 10 IBIA 205 (1982); Benally v. Navajo Area Director, 10 IBIA 221 (1982); Bischoff v. Acting Navajo Area Director, 10 IBIA 237 (1982); Clark v. Navajo Area Director, 10 IBIA 253 (1982); Dayzie v. Navajo Area Director, 10 IBIA 269 (1982); Gordon v. Navajo Area Director, 10 IBIA 285 (1982); Green v. Navajo Area Director, 10 IBIA 301 (1982); Harvey v. Navajo Area Director, 10 IBIA 318 (1982); James v. Navajo Area Director, 10 IBIA 334 (1982); Kee v. Navajo Area Director, 10 IBIA 350 (1982); Kelwood v. Navajo Area Director, 10 IBIA 366 (1982); Paddock v. Navajo Area Director, 10 IBIA 382 (1982); Shirley v. Navajo Area Director, 10 IBIA 399 (1982); Tsosie v. Navajo Area Director, 10 IBIA 416 (1982); Willie v. Navajo Area Director, 10 IBIA 432 (1982); and Yazzie v. Navajo Area Director, 10 IBIA 448 (1982).